NO. 91-733
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

RANDY ARDEN FRIEOUF,

Petitioner

versus

UNITED STATES OF AMERICA, and FARM CREDIT BANK,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT FARM CREDIT BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

G. Blaine Schwabe, III*
Kevin M. Coffey
MOCK, SCHWABE, WALDO, ELDER,
REEVES & BRYANT
A Professional Corporation
Fifteenth Floor
211 North Robinson
One Leadership Square
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-5500

COUNSEL FOR RESPONDENT
THE FARM CREDIT BANK OF WICHITA

*Counsel of Record

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I.

INTRODUCTION

The Farm Credit Bank of Wichita, formerly known as the Federal Land Bank ("FCB"), one of the respondents herein, respectfully requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit (the "Petition") filed by the debtor and petitioner, Randy Arden Frieouf ("Petitioner"). The Petitioner seeks

review of the Opinion of the United States Court of Appeals for the Tenth Circuit (the "Court of Appeals") entered in the proceedings below on July 10, 1991.

II.

LISTING PURSUANT TO SUP. CT. R. 29.1

FCB is a Federally chartered instrumentality of the United States. FCB was established pursuant to 12 U.S.C. § 2011(a) through the merger of The Federal Land Bank of Wichita and The Federal Intermediate Credit Bank of Wichita. FCB is a part of the Farm Credit System and provides loans to borrowers in the Ninth Farm Credit District, which includes Oklahoma, Kansas, Colorado and New Mexico.

FCB has no parent company or non-wholly owned subsidiaries.

III.

CONSIDERATIONS FOR REVIEW ON WRIT OF CERTIORARI ARE NOT PRESENT

The usual criteria for granting a writ of certiorari are not present. The decision of the Court of Appeals does not conflict with the decision of another United States court of appeals on the same matter. Furthermore, the Court of Appeals has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

No issue before the Court of Appeals in this case is such an important question of federal law that it should be settled by this Court. Furthermore, the Opinion of the Court of Appeals has not decided a federal question in a way that conflicts with the applicable decisions of this Court.

IV.

QUESTIONS PRESENTED

In his Petition, Petitioner lists six "Questions Presented". However, in his "Reasons for Granting the Writ", Petitioner argues as to only two issues which may succinctly be restated as follows:

A. Where "cause" exists, may a bankruptcy court temporarily deny a discharge of certain debts under 11 U.S.C. § 349(a)?

B. Was there "cause" in this case for temporary denial of discharge of certain debts?[1]

V.

CHRONOLOGY OF RELEVANT EVENTS

In his statement of the case, Petitioner has failed to accurately include all of the relevant events which caused Petitioner's

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[1] The first issue encompasses Petitioner's "issues" No. 1, 2, 3, 4 and 5. The second issue covers Petitioner's "issue" No. 6.

bankruptcy case to be dismissed with prejudice. The relevant events of this case are as follows:

A. **September 20, 1985** - Petitioner filed a voluntary chapter 11 bankruptcy petition, commencing his bankruptcy case, in the United States Bankruptcy Court for the Western District of Oklahoma (the "Bankruptcy Court"; the "Bankruptcy Case"). Petitioner did not file a plan of reorganization until **June 10, 1986**, almost nine months later. No disclosure statement was filed at that time. See Order on Motions to Dismiss.[2]

B. **June 26, 1986** - Petitioner filed monthly operating reports for the months of December, 1985 through April, 1986. Petitioner did not file any other monthly operating reports until **June 25, 1987**, one year later, at which time monthly operating reports were filed for

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[2] The Order on Motions to Dismiss, entered by the Bankruptcy Court on February 14, 1989, is attached to the Petition as part of the Appendix, commencing on page 40 of the Appendix.

the months of May, 1986 through April, 1987. See Order on Motions to Dismiss.

C. **August 4, 1986** - Bankruptcy Court ordered Petitioner to file a disclosure statement by **August 20, 1986**. Petitioner ignored the Bankruptcy Court's order. A disclosure statement was not filed until **September 15, 1987**, over a year later. See Order on Motions to Dismiss.

D. **June 30, 1987** - FCB filed its first motion to dismiss the Bankruptcy Case. See Order on Motions to Dismiss.

E. **September 15, 1987** - Petitioner filed an amended plan of reorganization and disclosure statement.[3] See Order on Motions to Dismiss.

F. **November 13, 1987** - Bankruptcy Court entered its order scheduling a hearing on **December 8, 1987**, for approval of the disclosure statement. FCB filed its objection to the

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[3] Because Petitioner filed the amended plan of reorganization and disclosure statement, FCB withdrew, without prejudice, its motion to dismiss.

disclosure statement. See Order on Motions to Dismiss.

G. **December 8, 1987** - Hearing on disclosure statement conducted. Petitioner was given 30 days to amend the disclosure statement. An agreed order was to be presented and the plan of reorganization was to be set for a confirmation hearing.[4] No agreed order was ever entered. See Order on Motions to Dismiss.

H. **September 30, 1988** - FCB refiled its motion to dismiss. See Order on Motions to Dismiss.

I. **November 17, 1988** - Petitioner filed a second amended plan of reorganization and disclosure statement. See Order on Motions to Dismiss.

J. **December 13, 1988** - Hearing scheduled to approve disclosure statement. FCB and Farmers Home Administration ("FmHA"), the

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[4] In spite of repeated demands, Petitioner failed to provide FCB with the additional information required to effect an agreed amendment to the disclosure statement. As a result, an agreed order approving the disclosure statement was never entered.

other respondent herein, timely filed objections to the disclosure statement. FCB's motion to dismiss was denied without prejudice. The disclosure statement was approved as modified.[5] See Order on Motions to Dismiss.

K. **December 13, 1988** - Petitioner had not filed any monthly operating reports since **June, 1987**. Counsel for Petitioner advised the Bankruptcy Court that the delinquent monthly operating reports would be filed immediately.[6] See Order on Motions to Dismiss.

L. **December 13, 1988** - Bankruptcy Court ordered that Petitioner's amended plan of reorganization and disclosure statement be mailed to creditors no later than **December 30, 1988**. Bankruptcy Court further ordered that a

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[5] FCB objected to the disclosure statement, inter alia, on the grounds that it did not provide adequate information. Counsel for Petitioner agreed to provide this information. Accordingly, FCB agreed that it would withdraw its objection to the disclosure statement upon receiving this information.

[6] The delinquent monthly operating reports were not filed until February 10, 1989, approximately sixty (60) days later.

hearing on confirmation of the plan of reorganization would be held on January 25, 1989. See Order on Motions to Dismiss.

M. January 19-24, 1989 - Objections to the amended plan of reorganization were filed by FCB, FmHA and Grant County Bank. FCB refiled its motion to dismiss the Bankruptcy Case with prejudice. See Order on Motions to Dismiss.

N. January 25, 1989 - At scheduled hearing, plan confirmation could not be considered because Petitioner had not mailed the amended plan of reorganization and the disclosure statement to creditors. FCB's motion to dismiss was taken under advisement by the Bankruptcy Court. FmHA subsequently joined in FCB's motion to dismiss with prejudice. See Order on Motions to Dismiss.

O. January 25, 1989 - Bankruptcy Court noted that Petitioner's monthly operating reports, which the Bankruptcy Court had been assured would be filed at the December 13, 1988 hearing, had still not been filed. These

reports were subsequently filed, but not until **February 10, 1989**. See Order on Motions to Dismiss.

- Bankruptcy Court further noted that in order to confirm a plan of reorganization, it would still be necessary for the Bankruptcy Court to convene a valuation hearing on certain of Petitioner's assets, and once again, convene a hearing to determine whether the disclosure statement should be approved. Furthermore, if the disclosure statement was approved, the Bankruptcy Court would be required to conduct a hearing on the confirmation of the amended plan of reorganization. See Order on Motions to Dismiss.[7]

- Bankruptcy Court further noted that after more than three years, during which time

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[7] The significance of these observations by the Bankruptcy Court is that Petitioner had been in a chapter 11 case for more than 3 years without even pursuing some of the most basic prerequisites to the plan confirmation process -- determinations of amounts of claims and collateral values. Of course, during that 3-year plus period, Petitioner enjoyed the benefits of chapter 11, including the protection from his creditors afforded by the automatic stay of 11 U.S.C. § 362(a).

creditors were prevented from exercising their rights against their collateral by reason of the automatic stay, there still appeared to be virtually universal rejection of Petitioner's proposed plan of reorganization. See Order on Motions to Dismiss.

P. **February 18, 1989** - Bankruptcy Court entered its Order on Motions to Dismiss and directed that an additional hearing would be conducted on **February 28, 1989**, at which time Petitioner could appear and show cause why the Bankruptcy Case should not be dismissed with prejudice. See Order on Motions to Dismiss.

Q. **February 28, 1989** - Petitioner and counsel for Petitioner failed to appear at the show cause hearing. Petitioner and his counsel failed even to notify the Bankruptcy Court or opposing counsel that they would not appear. See Order of Dismissal.[8]

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[8] The Order of Dismissal, entered by the Bankruptcy Court on March 8, 1989, is attached to the Petition as part of the Appendix, commencing on page 62 of the Appendix.

R. **March 8, 1989** - Bankruptcy Court entered Order of Dismissal, dismissing Bankruptcy Case with prejudice to the filing of any bankruptcy petition by Petitioner for a period of three (3) years. See Order of Dismissal.

S. **December 29, 1989** - United States District Court for the Western District of Oklahoma, in Case No. CIV-89-1126-T, entered a Memorandum Opinion affirming the decision of the Bankruptcy Court. See Memorandum Opinion.[9]

T. **July 10, 1991** - Court of Appeals entered its Opinion. See Opinion.[10]

VI.

PETITIONER'S MISSTATEMENTS OF FACT

Sup. Ct. R. 15.1 provides that the brief in opposition to a petition for writ of

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[9] A copy of the Memorandum Opinion is attached to the Petition as part of the Appendix, commencing on page 30 of the Appendix.

[10] A copy of the Opinion is attached to the Petition as part of the Appendix, commencing on page 2 of the Appendix.

certiorari "should address any perceived misstatements of fact or law set forth in the petition . . . ." The Petition is replete with misstatements which cannot go unmentioned.

Rather than address each misstatement in the body of this brief, for the sake of brevity, Schedule 1 is attached hereto for such purpose.

VII.

PETITIONER'S MISSTATEMENTS OF LAW -- ARGUMENTS AND AUTHORITIES

As noted above, Sup. Ct. R. 15.1 directs the a brief in opposition to a petition for writ of certiorari address perceived misstatements of law. The following discussion concerns misstatements of law contained in the Petition.

The discussion is organized as it pertains to the questions presented (see part IV, infra.)

A. WHERE CAUSE EXISTS, A BANKRUPTCY COURT MAY TEMPORARILY DENY A DISCHARGE OF CERTAIN DEBTS UNDER 11 U.S.C. § 349(a).

1. The Court of Appeals Properly Construed 11 U.S.C. §349(a).

11 U.S.C. § 349(a) provides as follows:

> "Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109[g] of this title.[11]

11 U.S.C. § 109(g) provides in pertinent part as follows:

> "Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any

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[11] As presently drafted, 11 U.S.C. § 349(a) references 11 U.S.C. § 109(f). However, this is the result of an oversight. 11 U.S.C. § 109(f) was redesignated 109(g) by the Bankruptcy Judges, United States Trustees and Family Farmer Act of 1986, Pub. L. No. 99-554. A conforming amendment to 11 U.S.C. § 349(a) was inadvertently not enacted.

> time in the preceding 180 days if --
>
> "(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
>
> "(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title."

The Court of Appeals termed the provision before the semi-colon in 11 U.S.C. § 349 as the "discharge" clause and the language after the semi-colon as the "filing" clause. The Court of Appeals found that it was the "discharge" clause which was applicable in this case; not the "filing" clause.[12]

Under the discharge clause, the dismissal of a case does not bar the discharge of debts in a later case unless the court, for

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[12] The filing clause prohibits the filing of any bankruptcy petition for 180 days if the requirements of 11 U.S.C. § 109(g) are met.

cause, orders otherwise. In this case, there was sufficient "cause".

2. Petitioner Erroneously Relies Upon 11 U.S.C. §§ 523, 727 and 1141

As discussed more fully below, Petitioner contends that findings of "cause" for dismissal with prejudice can be made only under the provisions of 11 U.S.C. §§ 523, 727 and 1141. Petitioner argues, without citation of authorities, that outside of these three bankruptcy code sections (i.e., 11 U.S.C. §§ 523, 727, and 1141), there can be no "cause" which will support a temporary denial of the dischargeability of certain debts. Petitioner is wrong.

a. 11 U.S.C. § 523[13] is not applicable.

11 U.S.C. § 523(a) provides that certain debts of an individual debtor are excepted from a discharge under 11 U.S.C. §§ 727, 1141, 1228(a), 1228(b) or 1328(b).

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[13] 11 U.S.C. § 523(a) and (c) are set forth in the Appendix attached hereto.

None of these sections has any application to this case.[14]

A determination that a debt is not discharged under 11 U.S.C. § 523 is a determination that the specific debt is permanently precluded from discharge. 11 U.S.C. § 523(a) lists twelve types of debts which are not dischargeable. None of these twelve specific exceptions apply in the Bankruptcy Case.

11 U.S.C. § 523 simply has no application to this case.[15] 11 U.S.C. § 523

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[14] 11 U.S.C. § 727 is the provision of title 11 of the United States Code which provides for a discharge for debtors in chapter 7 (liquidation) cases -- Petitioner was a debtor in the Bankruptcy Case which he filed under chapter 11 (Reorganization). 11 U.S.C. §§ 1141, 1228(a-b) and 1328(b) provide for discharge for debtors who obtain confirmed plans in cases under chapter 11 (Reorganization), chapter 12 (Adjustment of Debts of a Family Farmer with Regular Annual Income) and chapter 13 (Adjustment of Debts of an Individual with Regular Income) -- 11 U.S.C. §§ 1228(a-b) and 1328(b) have no application as Petitioner was a chapter 11 debtor; 11 U.S.C. § 1141 only applies when a plan is confirmed.

[15] Moreover, Petitioner incorrectly states that actions under 11 U.S.C. § 523 are always adversary proceedings that are always governed by Bankruptcy Rule 4007 and Part VII of the Bankruptcy Rules. 11 U.S.C. § 523(c) [which is included in the Appendix] requires a complaint to determine the dischargeability of only those

does not address, and is not intended to address, the temporary denial of dischargeability of certain debts for "cause" under 11 U.S.C. § 349(a).

b. 11 U.S.C. § 727[16] is not applicable.

Petitioner also argues that 11 U.S.C. § 727 applies. 11 U.S.C. § 727 provides that the bankruptcy court shall grant a chapter 7[17] debtor a discharge unless certain grounds for denial exist. If any of the grounds are present, the debtor is denied a discharge of all of his debts.[18]

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debts listed under 11 U.S.C. § 523(a)(2), (4) and (6). 11 U.S.C. § 523 provides for the automatic exception from discharge of the other nine types of debts.

[16] 11 U.S.C. § 727 is included in the Appendix.

[17] As noted above, 11 U.S.C. § 727 has no application to this case because this is a case under chapter 11, not chapter 7, of title 11 of the United States Code. See footnote 14, supra.

[18] 11 U.S.C. § 727 is to be distinguished from 11 U.S.C. § 523. 11 U.S.C. § 523 addresses the dischargeability of specific debts. 11 U.S.C. § 727 addresses the issue of whether the debtor should be discharged in bankruptcy of all of his debts, or denied a discharge in bankruptcy of all of his debts.

11 U.S.C. § 727 simply does not apply to this case, as it does not address the temporary denial of dischargeability of certain debts for "cause" under 11 U.S.C. § 349(a).

c. 11 U.S.C. § 1141[19] is not applicable.

Petitioner also argues that 11 U.S.C. § 1141 applies to this case. Again, Petitioner is wrong. 11 U.S.C. § 1141, which deals with post-confirmation matters, is not applicable simply because a plan was never confirmed in this case.

11 U.S.C. § 1141 provides that the confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under 11 U.S.C. § 523 or 727.

3. The Term "For Cause" in 11 U.S.C. § 349(a) Does Not Require Prior Adjudications.

Petitioner next argues that the term "for cause" in 11 U.S.C. § 349 requires prior adjudications of nondischargeability of debts

[19] 11 U.S.C. § 1141 is included in the Appendix.

under 11 U.S.C. § 523 or denials of discharge under 11 U.S.C. § 1141 (incorporating 11 U.S.C. § 727).

Petitioner is again wrong. 11 U.S.C. § 349(a) makes no reference to 11 U.S.C. §§ 523, 727 or 1141 with regard to what may constitute "cause".

The legislative history of 11 U.S.C. § 349(a) indicates that 11 U.S.C. § 349(a) was intended by Congress to provide for pre-discharge dismissals. The legislative history makes only one reference as to 11 U.S.C. § 727, which is as follows:

> "If the debtor has already received a discharge and it is not revoked, then the debtor would be barred under Section § 727(a) from receiving a discharge in a subsequent liquidation case for six years."

S. Rep. No. 989, 95th Cong., 2d Sess. (1978). 11 U.S.C. § 349(a) applies pre-discharge, i.e., before any determinations of dischargeability or denials of discharge would even need be considered.

Therefore, Petitioner's argument that some prior determination of dischargeability or denial of discharge is required is misplaced.

4. The Court of Appeals Did Not Exercise Original Jurisdiction to Impose New Restrictions on Petitioner.

Petitioner contends, in a somewhat confusing manner, that the Court of Appeals exercised original jurisdiction to impose new restrictions on Petitioner. Petitioner is mistaken.

The Bankruptcy Court went through a detailed summary of the Bankruptcy Case as reflected in its Order on Motions to Dismiss and its Order of Dismissal, and found that "cause" existed for the dismissal of the Bankruptcy Case with prejudice to the filing of a subsequent bankruptcy petition for three (3) years. See V.B. below. The Court of Appeals made no new findings, and simply noted that the findings of the Bankruptcy Court were determinations which amounted to acts of bad

faith and prejudice by Petitioner. See V.B. below.

The Court of Appeals modified the Bankruptcy Court's ruling (to the benefit of Petitioner) by holding that the Bankruptcy Court could not enjoin the filing of any bankruptcy petition by Petitioner for a three-year period. However, the Court of Appeals upheld that portion of the Bankruptcy Court's decision which prohibited the discharge of those debts existing in the Bankruptcy Case for a period of three (3) years.

Petitioner, therefore, simply is mistaken in his argument that the Court of Appeals exercise original jurisdiction.

B. "CAUSE" EXISTED FOR TEMPORARY DENIAL OF DISCHARGE OF CERTAIN DEBTS.

The Bankruptcy Court, as reflected in the Order on Motions to Dismiss, summarized the procedural history of the Bankruptcy Case and found the following:

- that there was little or no apparent effort on the part of

Petitioner's counsel to formulate a confirmable plan of reorganization;

- that the only plans filed had been filed solely to create an argument in opposition to various motions seeking to terminate the proceeding;
- that the first plan was not even accompanied by a disclosure statement and that an approved disclosure statement is a necessary prerequisite to the solicitation of acceptances;
- that the failure to file a disclosure statement continued even after the court had ordered the filing of the disclosure statement;
- that the first amended plan of reorganization was accompanied by a disclosure statement, but

after a hearing, when the Bankruptcy Court directed that the same be amended within thirty days, no further action was taken;

- that the most recent disclosure statement and plan of reorganization were filed 38 months after the initiation of these proceedings;
- that even after Petitioner's counsel was directed to transmit to creditors the plan and disclosure statement, as modified, no such transmittal was effected;
- that there were numerous failures by Petitioner to comply with orders of the Bankruptcy Court;
- that these failures were cleverly characterized by

Petitioner's counsel as being simply the result of misunderstandings on the part of counsel;[20] and

- that after having reviewed the "almost unbelievably lengthy record of proceedings in this case," the Bankruptcy Court was convinced that the criteria established for dismissal with prejudice were met.[21]

The Bankruptcy Court did not dismiss the Bankruptcy Case with prejudice until after the Bankruptcy Court advised Petitioner and his counsel of the Bankruptcy Court's findings discussed above and gave Petitioner and his counsel the opportunity to attend the "show cause" hearing. The Bankruptcy Court, as

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[20] "Misunderstandings which, in several instances, would only be possible if counsel were unable to communicate in the English language." See Order on Motions to Dismiss.

[21] See discussion at V above regarding additional findings which support dismissal with prejudice.

reflected in the Order of Dismissal, held that Petitioner had established "a clear record of delay and contumacious conduct which justifies prohibiting [Petitioner] from filing another bankruptcy petition for a period of time."

The Bankruptcy Court found "cause" for dismissing the Bankruptcy Case with prejudice. Neither the District Court nor the Court of Appeals made, or was required to make, additional findings of "cause" for the dismissal with prejudice. The Court of Appeals did conclude, however, that the Bankruptcy Court's specific findings of "cause" amounted to findings of bad faith and prejudice. See Court of Appeals' Opinion.

The Court of Appeals held as follows:

> "After carefully reviewing the record, we conclude that several facts and circumstances support the [B]ankruptcy [C]ourt's conclusion that [Petitioner] acted in bad faith and in a manner that was prejudicial to his creditors . . . . In view of these facts, we cannot say that the [B]ankruptcy [C]ourt's findings of bad faith and

prejudice were clearly erroneous."

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

G. Blaine Schwabe, III
(Counsel of Record)
Kevin M. Coffey
MOCK, SCHWABE, WALDO, ELDER, REEVES & BRYANT
A Professional Corporation
Fifteenth Floor
211 North Robinson
One Leadership Square
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-5500

COUNSEL FOR RESPONDENT
THE FARM CREDIT BANK OF WICHITA

14\Frieouf.OBJ (618-698)

SCHEDULE 1

PETITIONER'S MISSTATEMENTS OF FACT

Petitioner's Statement	Response
1. "On June 10, 1986, Debtor filed his plan of reorganization." (Petition, p. 8)	Misleading -- Petitioner fails to state that his plan of reorganization was filed without a disclosure statement. Therefore, the filing of the plan served little or no purpose.
2. "On December 1, 1987, FLB objected to Debtor's disclosure statement, even though it had settled and withdrawn it's motion for relief from stay on August 31, 1987." (Emphasis added.) (Petition, pp. 9-10)	Misleading -- There is absolutely no relevance between FCB's objection to a disclosure statement and the resolving of a motion for relief from stay.
3. "[O]n February 29, 1988, a hearing on value was held and FLB was to submit an agreed order." (Petition, p. 10)	Misleading -- An agreed order was to be submitted by the parties. FCB transmitted a proposed agreed order to James Truax, one of Petitioner's attorneys. The agreed order was never returned to counsel for FCB.

4. "[A] dispute as to land valuation arose on the property upon which Grant County Bank had a lien." (Petition, p. 11)	Misleading -- Petitioner implies there was an agreement between Petitioner and Grant County Bank as to value. However, there is nothing of record indicating there was ever an agreement between Grant County Bank and Petitioner as to an agreed value.
5. "On January 25, 1989, the Bankruptcy Court held a hearing on the Plan, but there had been confusion as whether the Disclosure Statement had been approved, since creditors' consent to the required modification could not be obtained." (Petition, p. 11)	Misleading -- The only confusion was on the part of Petitioner. Furthermore, Petitioner ignores the fact that he failed to transmit the amended plan of reorganization and the disclosure statement to the creditors as ordered by the Court. See discussion in FCB's brief at V.L. and V.N.
6. "The confusion was no fault of Debtors, and the confusion was shared. Kevin Coffey, attorney for Farm Credit Bank, at one point even informed Debtor's counsel that there was no hearing scheduled for January 25, 1989." (Petition, pp. 11-12)	False and misleading -- Petitioner was the only one confused. Kevin Coffey did not advise Petitioner's counsel that there was no hearing scheduled for January 25, 1989. Furthermore, even if Mr. Coffey had made such a representation (which he did not), it would not have

	prejudiced Debtor's counsel. According to Petitioner's counsel, the alleged misrepresentation by Mr. Coffey was made on Friday, January 20, 1989. See transcript of hearing conducted on January 25, 1989, p. 15. The Bankruptcy Court had already ordered that the amended plan of reorganization and disclosure statement were to be mailed to creditors no later than December 30, 1988 (which Petitioner's counsel failed to mail). See discussion in FCB's brief at V.L. and V.N. Furthermore, Petitioner's counsel obviously knew of the hearing scheduled for Wednesday, January 25, 1989, since he was present for the hearing.
7. "Where there were four lawyers before, there was now only one -- William L. Needler." (Petition, p. 13)	Misleading -- Throughout the Bankruptcy Case, and as recently as the filing of Petitioner's Reply Brief with the Tenth Circuit Court of Appeals, Mr. Needler has indicated that Bruce Hammer of

	Blackwell, Oklahoma, is co-counsel with Mr. Needler in this litigation. There is no explanation by Petitioner or Mr. Needler as to why Mr. Hammer, the co-counsel, was not available to represent Petitioner's interest.
8. "On February 14, 1989, the Bankruptcy Court filed its Order on motions to dismiss (A. 40), holding that Debtor's dilatory and contumacious conduct over the course of the proceeding required dismissal with prejudice." (Petition, p. 13)	False -- The Bankruptcy Court's Order on Motions to Dismiss, entered on February 14, 1989, made findings that Petitioner's actions were dilatory and contumacious. The Order on Motions to Dismiss advised Petitioner that a hearing would be conducted on February 28, 1989, at which time Petitioner was required to "show cause" as to why the bankruptcy case should not be dismissed with prejudice. As discussed above, Petitioner and his counsel failed to attend the show cause hearing scheduled for February 28, 1989. See discussion in FCB's brief at V.P. and V.Q.

9. "The Bankruptcy Court's Order was received by the Needler firm in Chicago on February 16, 1989, when most of the staff had departed and Mr. Needler was out of town." (Petition, p. 14)	Misleading -- The Order that Petitioner is referring to is the Order on Motions to Dismiss, entered by the Bankruptcy Court on February 14, 1989, in which the Bankruptcy Court states that a hearing will be conducted on February 28, 1989, two weeks later, at which time Petitioner should show the Court why the case should not be dismissed with prejudice.
10. "On February 25, 1989, it was discovered that attorney Needler could not possibly journey all the way to Oklahoma to attend the show cause hearing on Tuesday, February 28, 1989, because of a scheduling conflict and an inability to leave Chicago for long at this critical time for the Needler firm." (Petition, p. 15)	Misleading -- Mr. Needler could have at least advised the Bankruptcy Court or counsel for the creditors by telephone on Monday, February 27, 1989, that he would not be able to attend the hearing. Mr. Needler failed to provide even this minor courtesy.

11. "Accordingly, on Sunday, February 26, 1989, attorney Needler requested the Bankruptcy Court by Express Mail to postpone the hearing, which was received by it on February 27, 1989." (Petition, p. 15)	Misleading -- Needler may have transmitted an application by Express Mail which was received by the Bankruptcy Court (or the clerk's office) at some time on February 27, 1989. However, the hearing to show cause was scheduled for the next morning at 9:30 a.m. Petitioner's counsel did not make any efforts to contact counsel for the creditors or the Bankruptcy Court by telephone prior to the scheduled "show cause" hearing. Furthermore, the application did not even include a signed Order by Petitioner's counsel. See Order on Motions to Dismiss.
12. "The debtor did not wait nine months to file an initial plan of reorganization. The debtor was forced to wait. There is no specific time requirement for submitting a plan and disclosure statement." (Petition, pp. 28-29)	False -- Petitioner filed a plan of reorganization on June 10, 1986. On August 4, 1986, the Bankruptcy Court ordered Petitioner to file a disclosure statement by August 20, 1986. Petitioner did not file the disclosure statement until September 15, 1987, over a year later.

13. "The early stages of the case were consumed by dilatory motion practice of creditors seeking relief from the automatic stay." (Petition, p. 29)	False -- There is nothing in the record to evidence that the creditors engaged in "dilatory motion practice". The actions taken by the creditors were to protect their rights and were permitted by the Bankruptcy Code.
14. "The bankruptcy court has neglected to mention, and so has the district court and the Court of Appeals, that the bankruptcy court granted relief from stay on a technicality to FLB." (Petition, p. 29)	Misleading -- FCB was granted relief from stay because Petitioner failed to timely file an objection and request for hearing to FCB's motion for relief from stay.
15. "There was no delay whatever except that caused by the creditors. What then transpired, for the next year and one-half is related at pages 9 through 17 of this petition. None of these facts give rise to bad faith on the part of Debtor." (Petition, pp. 30-31)	False -- Petitioner's failures and delays described in the brief to which this schedule is attached give rise to bad faith.

16. "At no time did the creditors move to strike the Plan for failure of consummation, for everyone, including the Court, was hopeful that Debtor could reorganize by agreement of the parties." (Petition, p. 31)	False -- On June 30, 1987, FCB filed a motion to dismiss the Bankruptcy Case on the grounds, inter alia, that Petitioner showed an inability to effectuate a plan of reorganization. FCB's motion to dismiss was voluntarily withdrawn, without prejudice, after Petitioner filed his amended plan of reorganization and disclosure statement. On September 30, 1988, FCB again filed a motion to dismiss the Bankruptcy Case on the grounds, inter alia, that Petitioner had shown an inability to effectuate a plan. FCB's motion to dismiss was heard before the Court on December 13, 1988, and denied without prejudice. On January 24, 1989, FCB filed its third motion to dismiss, on the grounds, inter alia, that Petitioner had shown an inability to effectuate a plan.

17. "This was a case where selfish creditors demanded additional valuations as the farm economy improved." (Petition, p. 31)	False -- Not only is this statement false, it is apparently some attempt by Petitioner to shift the attention from Petitioner's obvious attempts to abuse the bankruptcy system, to victimized creditors which were (and continue to be) subjected to bad faith, dilatory and often meritless litigation.
18. "The creditors were not prejudiced by any delay, they were materially assisted -- and they were in fact a principal cause of delay."	False -- To say that creditors have not been prejudiced by Petitioner's obvious tactics is ludicrous. The record is clear that it was Petitioner who caused the delay.
19. "Perhaps most egregious is the failure of the bankruptcy court to allow further time for a show cause hearing when the Needler firm was failing and had closed down its Chicago office."	Misleading -- The Bankruptcy Court might have allowed a continuance had Petitioner's counsel taken the time and shown the courtesy to telephone the Bankruptcy Court or counsel for the creditors.

20. "It is untrue Debtor "disobeyed" court orders. Debtor does not have to "obey" court orders which he has obtained that are no longer viable because the circumstances have changed -- creditors wouldn't agree as indicated or promised." (Petition, p. 33)	False -- The Bankruptcy Court described Petitioner's conduct as having "established a clear record of delay and contumacious conduct." The history of this case, as reflected by the record, confirms this description to be correct.
21. "It was alleged that failure to file monthly operating statements is a reason for prejudicial dismissal. However, the creditors neglect to mention that they didn't even notice their absence -- for the simple reason that small farmers do not have the accounting capabilities that other enterprises have, and there is little to report until the harvest is in and the profit is made." (Petition, pp. 33-34)	False -- On December 13, 1988, during a hearing, FCB advised the Bankruptcy Court that the Debtor had failed to file monthly reports since July of 1987.

22. "It is, of course, irrelevant at this point what the allegations of bad faith are because they are unproven -- the Court of Appeals has reversed and may not borrow findings below regarding another matter to infer bad faith sufficient to prevent the dischargeability of debt in another proceeding."	False -- See discussion in FCB's brief at VII.A.4.

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NO. 91-733

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

RANDY ARDEN FRIEOUF,

Petitioner

versus

UNITED STATES OF AMERICA, and FARM CREDIT BANK,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDIX OF RESPONDENT
FARM CREDIT BANK

11 U.S.C. § 523(a) and (c)

EXCEPTIONS TO DISCHARGE

(a) A discharge under Section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --

(1) for a tax or a customs duty --

(A) of the kind and for the periods specified in Section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required --

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by --

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing --

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit

Protection Act (15 U.S.C. 1601 et seq.);

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit --

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement, but not to the extent that --

(A) such debt is assigned to another entity, voluntarily, by

operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty --

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless --

(A) such loan first became due before five years (exclusive of any applicable suspension of the repayment

period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union; or

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise

be terminated due to any act of such agency.

* * * * * *

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

11 U.S.C. § 727

DISCHARGE

(a) The court shall grant the debtor a discharge, unless --

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed --

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case --

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case --

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371 or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least --

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all

debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if --

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge --

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of --

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

11 U.S.C. § 1141

EFFECT OF CONFIRMATION

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan --

> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not --

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if --

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.